U.S. Department of Labor

Board of Alien Labor Certification Appeals
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'Notice: This is an electronic bench opinion which has not been verified as official'

Date: February 3, 1999

Case No.: **1998 INA 187**

In the Matter of:

TEMPO RESTAURANT, Employer,

on behalf of

SHIMSHON MIMON, Alien

Certifying Officer: R. M. Day, Region IX.
Appearance: E. M. Weisz, Esq., of Beverly Hills, California, for Employer and Alien

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that TEMPO RESTAURANT ("Employer"), filed on behalf of SHIMSHON MIMON ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States

[1] The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On January 20, 1995, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Singer (Ethnic & Religious Music)" in Employer's Israeli Restaurant and Nightclub. The position was classified under DOT Occupation No. 152.047-010, SINGER.[2] The job duties were described as follows in the Employer's application:

> Sing in solo performances at Israeli restaurant and nightclub. Perform traditional and modern Israeli compositions including folk songs, Hasidic music, jazz compositions, etc. Sing traditional and customary religious music performed in both the Ashkanazi and Sephardic manner for the Jewish Sabbath and for holiday celebrations such as Rosh Hashannah (New Year), Sukkoth, Hannukah, Purim, Passover, etc. Study and rehearse for solo performances and performances with guest singers and musical groups. Perform variations on traditional Israeli music as per own arrangements.

AF 23, box 13. The work schedule proposed for the position was the following:

Tues.	6:00 PM to 1:00 AM	Fri.	5:00 PM to midnight
Wed.	4:00 PM to 10:00 PM	Sat.	5:00 PM to midnight
Thurs.	6:00 PM to 1:00 AM	Sun.	5:00 PM to 10:00 PM

AF 23 The qualifications for the position specified three years of experience in the Job Offered.[3] Although one hundred and sixty-three U. S. workers were referred for the job, none of the applicants was hired. AF 22.

Notice of Findings. The CO's March 13, 1997, Notice of Findings ("NOF") found (1) that the Employer failed to establish that the position offered was full time employment to which U. S. workers can be referred within the meaning of 20 CFR § 656.3; (2) that the Employer failed to establish that the job requirements were not unduly restrictive under 20 CFR §

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[2] 152.047-022 **SINGER** (amuse. & rec.; motion picture; radio-tv broad.) Sings as soloist or member of vocal ensemble; Interprets music, using knowledge of harmony, melody, rhythm, and voice production, to present characterization or to achieve individual style of vocal delivery. Sings, following printed text and musical notation, or memorizes score. May sing a cappella or with musical accompaniment. May watch CHORAL DIRECTOR (profess. & kin.) or CONDUCTOR, ORCHESTRA (profess. & kin.) for directions and cues. May be known according to voice range as soprano, contralto, tenor, baritone, or bass. May specialize in one type of music, such as opera, lieder, choral, gospel, folk, or country and western and be identified according to specialty. *GOE: 01.04.03 STRENGTH: L GED: R4 M3 L4 SVP: 8 DLU:77*

[3] The hours provided for a forty hour week based on the times when the nightclub was open. The Employer offered a salary of $460 with no overtime.

656.21(b)(2)(i)(A); (3) that due to the unduly restrictive requirements the position apparently was tailored to the Alien's unique experience and/or was created for him and consequently not "clearly open to any qualified U. S. worker.

Findings. (1) While the schedule indicated that the job called for thirty-two hours, the Employer said the worker would be singing approximately three hours each night, suggesting that this was a part-time position for eighteen hours a week.[4] (2) Citing 20 CFR §§ 656.21(b)(1), 656.21(g), and 656.24(b), the NOF noted that the state employment security agency ("the state agency") received a list of one hundred and sixty-three vocalists through the musicians' union local which it turned over to the Employer. The NOF directed Employer to provide evidence of its efforts to recruit from that list of one hundred and sixty-three referrals for this job. (3) Citing 20 CFR § 656.20(c)(8), the NOF said, "The fact that there is a question about the *bona fides* of the application indicates this position is tailored to the unique experience of the alien and/or created for him and is therefore not 'clearly open to any qualified U.S. worker.'" (4) Citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), the NOF said, "The evidence in hand is not convincing your efforts to contact the 163 vocalists available took place at all, or 'as early as possible' as [the state agency] had directed. The evidence also shows you did not conduct a good-faith recruitment effort. The recruitment is considered tardy and incomplete." AF 20. The NOF then discussed the evidence Employer was required to proffer to sustain the burden of proof.

Rebuttal. On April 17, 1997, the Employer filed a Rebuttal, which consisted of a letter from counsel, letters from the Employer, a letter from the union, and evidence of the entertainment and food service Employer provided. AF 05-17. The Employer said, *inter alia*,

> It is essential that we be able to provide the services of a full time Singer experienced of religious & ethnic Jewish & Israeli music. Please be aware that this position has always existed at our restaurant. Presently, we employ several individuals who possess the qualifications and background as Israeli & Jewish vocalists at our restaurant. However, this has proven unsatisfactory. Often, the singers cancel or their appearances conflicted with other appearances or other work. Therefore, it was determined that the only satisfactory solution was to locate a qualified individual with the background and experience required and offer him a full-time position."

AF 07-08. While 3-4 hours a day would be spent performing, depending on the length of the shift, this is a full-time position. The singer would be on Employer's premises during the entire shift. Also, the singer would spend 2-3 hours a day in rehearsing with instrumentalists and with any musical groups making a special appearance at the club. In addition, the work schedule included 2-3 twenty minute breaks per night. Lastly, as part of his duties the singer would be expected to mingle with the customers during the shift. The Employer then stated its guarantee of a two year contract for a full-time position at the salary offered for the position. Finally, the Employer responded to the suggestion that singers were available through the musicians' union

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[4] In discussing corrective action, the NOF said that, "Permanence for entertainer positions can be shown with a contract extending at least two years."

and the recopmmendation for the posting of a notice at the union premises.

Final Determination. After considering Employer's rebuttal documentation with the remainder of the record, the CO denied certification by the Final Determination issued on May 2, 1997. AF 03-04. The CO concluded that the Employer failed to establish that the position constituted a permanent full-time job under the Act and regulations. After considering the rebuttal assertions, the CO said

> We note that 'rehearsing' is not given as a job duty customary to the occupation of Singer 152.047-022; we also were not aware that break time is considered part of normally scheduled work hours. The evidence is not convincing [that] you have a bona-fide job offer that complies with regulation 20 CFR 656.3.

The CO then reviewed the NOF and rebuttal concerning the finding that this was a job created for the Alien and concluded,

> Your rebuttal indicates you have not employed persons in this position at the same terms and conditions you now require of U.S. workers. You have not shown this job opportunity to be clearly open to any qualified U.S. worker.

The CO then denied the application for alien labor certification.

Appeal. The Employer appealed to BALCA on May 29, 1997. Its appellate arguments responded to the CO's reasons for the denial of relief in the Final Determination. After discussing the inclusion of rehearsal time as part of the forty hours a week of full time employment for singers, the Employer noted and enlarged on the rebuttal explanation of its need for a full time singer,

> The employer's rebuttal letter explains in detail that this position has always existed at the restaurant. The CO does not challenge this claim. The employer explained that they attempted to fill this full-time position [with] several part-time employees without success. ... Therefore, it was determined that the only satisfactory solution was to locate a qualified individual with the background and experience required and offer him a full-time permanent position.

The Employer concluded that it had substantiated that the part-time employment of various individuals has proven unsatisfactory, and that it had justified the need for a permanent full-time employee for the offered position. AF 02.

Discussion

Burden of proof. The Employer was required by the NOF to proffer the evidence of the existence of a full time position and that its hiring criteria were not unduly restrictive requirements. The Employer must present the evidence and carry the burden of proof as to all of

the issues arising under its application pursuant to the Act and regulations.[5] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[6]

Analysis and conclusion. The CO's findings (1) that the Employer failed to establish that the position offered was full time employment to which U. S. workers can be referred and (2) that this was a position specially created for the Alien have been examined to determine whether they were supported by the evidence of record.[7]

We agree with the Employer's contention that the time spent in rehearsal should be considered in computing the number of hours that the position requires. As part of the job description stated in Form ETA 750A, the Employer expressly included the following:

> Study and rehearse for solo performances and performances with guest singers and musical groups.

Supra. Even though the CO correctly observed that "rehearsing" is not a job duty customary to the occupation of Singer in the DOT Occupation description at 152.047-022 (see footnote *supra*), the Employer's argument rationally sustained its burden of proof because (1) its Job Description did include rehearsing and (2) paid rehearsals are implied in the performance elements described by the DOT. Consequently, the number of hours that the Employer said were required for rehearsing should have been examined to determine whether they were supported by credible evidence. If proven, the hours claimed should have been considered in the CO's computation of the time necessary to perform this job under 20 CFR § 656.3.

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[5] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[6] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

[7] In view of the job description in Form ETA 750A, the Panel observes that this is **not** an application under 20 CFR § 656.21a, "Applications for labor certifications for occupations designated for special handling," under which an employer may apply for a labor certification to employ an alien represented to be of exceptional ability in the performing arts. In such a case an employer's burden of proof would require it to demonstrate the alien's exceptional ability in the performing arts under 20 CFR § 656.21a(a)(iv).

The Employer's burden of proof further required it to establish that this position was not specially created for the Alien, however. Based on the NOF and the rebuttal, the CO said in the Final Determination that the Employer's rebuttal indicated that it had not previously employed persons in this position at the same terms and conditions now required of U.S. workers and that 20 CFR § 656.20(c)(8) required Employer to prove that this job opportunity was clearly open to any qualified U.S. worker. While Employer's rebuttal contentions were duly considered, the arguments and evidence that it first offered in the appellate brief were not entitled to substantial weight because they had not been offered for consideration by the CO. **Huron Aviation** 88 INA 431 (Jul. 27, 1989).

Moreover, in responding to the Final Determination, the Employer explained that its failure to fill this job with part-time employees led it to try to find "a qualified individual with the background and experience required and offer him a full-time permanent position." Employer's contention that its efforts to hire the part-time employees were unsuccessful was not established by any form of factual proof. The critical details of names, dates, and specific circumstances were entirely absent. Instead, the Employer's rebuttal had offered only vague generalizations that amounted to unpersuasive conclusory statements.

Summary. Based on the text of the job description stated in Form ETA 750A, the Panel finds that the Employer's job description rendered the Job Offered so unique that it clearly was not open to any qualified U.S. worker. At no point did Employer suggest that its job requirements, as stated in the application were normally required for a job as a Singer in the United States.[8] **Lebanese Arak Corp.**, 87 INA 683(Apr. 24, 1989)(*en banc*). On the other hand, even though the application's statement of the Job Duties was encompassed by the DOT, the job was so acutely narrowed by the stated job requirements that none of the one hundred and sixty-three vocalist members of the Los Angeles musicians' local felt sufficiently qualified to inquire or to submit a resume when it was posted. Noting that the Employer argued on appeal that the CO failed to preserve the issue that the description of Job Duties stated unduly restrictive job requirements under 20 CFR § 656.21(b)(2), the Panel observes that in the Final Determination the CO found that the job requirements had so narrowly tailored the position to the Alien's unique experience that the job appeared to have been created for him. As the evidence of record supported the CO's conclusion that the Employer failed to sustain the burden of proof that the job was "clearly open to any qualified U. S. worker under 20 CFR § 656.20(c)(8), the CO's denial of alien labor certification should be affirmed.

Conclusion. The panel concludes that the NOF provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer's rebuttal failed to sustain the burden of proof that the job was "clearly open to any qualified U. S. worker under 20 CFR § 656.20(c)(8). Since the evidence of record supports the CO's denial of labor certification under the Act and regulations, the following order will enter.

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[8]The text of the Employer's job requirements appears *supra* verbatim at p. 2.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

SERVICE SHEET

Case No.: 1998 INA 187
TEMPO RESTAURANT, Employer,
SHIMSHON MIMON, Alien
Title : Decision and Order

I certify that on the above-named document was mailed to the last known address of each of the following parties and their representatives:

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BALCA VOTE SHEET

Case No.: **1998 INA 187**
TEMPO RESTAURANT, Employer,
SHIMSHON MIMON, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 27, 1998